United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2352

ORIGINAL

To be argued by
BENJAMIN SCHLESINGER

United States Court of Appeals
For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Remand from the Supreme Court of the United States

BRIEF OF DEFENDANT-APPELLEE DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES

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PRELIMINARY STATEMENT

This brief is submitted by defendant-appellee District Council 37, American Federation of State, County and Municipal Employees in support of the Order and Judgment of District Judge Whitman Knapp, 379 F. Supp. 679 (S.D.N.Y. 1974) dismissing sua sponte the plaintiffs-appellants' complaint for failure to state a cause of action.

COUNTER-STATEMENT OF ISSUE PRESENTED FOR REVIEW AS TO DISTRICT COUNCIL 37

Whether plaintiffs' complaint states causes of action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000(e) et seq. and the Fourteenth Amendment of the United States Constitution against District Council 37 when the complaint alleges only that District Council 37 discriminated against plaintiffs by (a) negotiating and approving health and hospitalization benefits which do not cover maternity benefits or are limited to specific maximums therefor; and (b) establishing and administering a fringe benefit plan which excludes temporary disability benefits for pregnancy and pregnancy-related disabilities and, under an option covering major medical expenses, expenses for normal pregnancies?

COUNTER-STATEMENT OF THE CASE

Plaintiffs' omnibus and prolix complaint (2a-45a) sets forth in eighty-one separately numbered paragraphs, eleven separate and distinct causes of action, each of which is against one to four of seventeen defendants. In causes of action alleging violations of Title VII, the Civil Rights Act of 1866 and the Fifth and Fourteenth Amendments to the United States Constitution,* plaintiffs claim that all defendants, in one way or another, have discriminated against all female employees of the City of New York who did become or were capable of becoming pregnant since April 22, 1968, as well as all male City employees with wives or dependents who did become or who were capable of becoming pregnant since that date. In particular, in separate causes of action, plaintiffs allege discriminatory exclusion of pregnancy and pregnancy related conditions from various health and welfare plans and, in addition, the discriminatory implementation and administration of leave policies for those who are pregnant.

* In addition, plaintiffs' alleged that the District Court had pendent jurisdiction of "related claims" arising under the Constitution and laws of the State of New York, the Administrative Code of the City of New York, and New York City Mayoral Executive Order No. 71, April 2, 1968, as amended by Executive Order No. 23, August 24, 1970.

Of the eleven separate causes of action only two causes of action are alleged against District Council 37.* The first claim is found in the third cause of action contained in paragraphs 62 and 63 (35a). Paragraph 62 merely repeats and realleges paragraphs 1 through 59 of the complaint. Paragraph 63 reads in its entirety as follows:

> 63. Defendants SSEU, D.C. 37 and UFT have discriminated against plaintiffs and the class because of sex, in that they have negotiated and approved health and hospitalization insurance fringe benefits which are discriminatory, thereby causing plaintiffs and the class they represent damages as previously alleged.

The discriminatory health and hospital insurance fringe benefits referred to are alleged in paragraphs 51 through 59 of the complaint, as follows: there are offered "substantially fewer benefits for pregnancy and pregnancy related conditions than for other medical and surgical problems requiring hospital and medical care" (28a); less benefits for hospital charges in connection with pregnancy benefits than they provide for non-maternity hospitalization (28a-29a,30a); emergency care is not covered for maternity

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* District Council 37 is a labor organization (20a-21a). The claims against it are that it "negotiated", "approved", "established", and "administered" certain discriminatory benefits which are paid by the D.C. 37 Health & Security Plan, a non-contributory union welfare fund (21a). For the purposes of this appeal, the allegations of the complaint must be deemed to be true; however, a grave factual issue is presented as to District Council 37's actual participation or ability to participate in the types of benefits which may be covered by an independent and separately administered welfare plan.

nor is normal delivery when same occurs outside of New York City (29a); a major medical plan provided no coverage whatever for normal delivery or infant care (31a); the benefit for doctor's care for obstetrical delivery and surgical maternity procedures are limited (31a-33a); there are excluded from coverage numerous pregnancy related benefits (31a), including ambulance service and professional nursing care (32a-33a).

The second claim alleged against District Council 37 is found in the fifth cause of action contained in paragraphs 67, 68 and 69 (37a-38a). Paragraph 67 merely repeats and realleges paragraphs 1 through 49 of the complaint. There are thus excluded from its terms all of the alleged acts of discrimination set forth above and encompassed within the terms of the first claim. Paragraphs 68 and 69 read in their entirety as follows:

> 68. The defendants City, D.C. 37 and D.C.37 Health & Security Plan have discriminated against plaintiffs Robertson, Boyarsky, Gross, Justic and Carter, and other class members, because of their sex in that the defendants have established and administered the defendant D.C. 37 Health and Security Plan which offers no temporary disability benefits for pregnancy and pregnancy-related conditions, while wage replacement disability benefits are paid for temporary disabilities resulting from other conditions.

69. Defendants City, D.C. 37 and D.C. 37 Health & Security Plan have discriminated against plaintiffs Robertson, Boyarsky, Justic and Carter, and other class members, because of sex in that the defendants have established and administered the defendant D.C. 37 Health & Security Plan which includes a Family Major Medical Option supplementing coverage provided by the defendant City's health insurance plans. However, expenses for normal pregnancies are excluded from coverage under the option. (37a-38a)

PRIOR LEGAL PROCEEDINGS

Plaintiffs' complaint was filed on January 17, 1974, at a time when the law was developing that the exclusion of benefits for pregnancy-related disabilities was per se violative of the Fourteenth Amendment and Title VII,* During the course of pre-trial proceedings and while various motions for dismissal and determination of class were pending, the Supreme Court rendered its decision in Geduldig v. Aiello, 417 U.S. 484, 94 S. Ct. 2485 ("Aiello"), which held that California's decision not to insure under its disability program

* The EEOC had already in effect a guideline stating that disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are to be treated as any other health or temporary disability under applicable insurance or sick leave plans and that benefits shall be applied to such disabilities on the same terms and conditions as they are applied to other temporary disabilities. 29 CFR §1604.10(b). See Aiello v. Hanson, 359 F. Supp. 792 (D.C. D.C. 1973); Wetzel v. Liberty Mutual Insurance Company, 372 F. Supp. 1146 (W.D.Pa. 1974).

the risk of disability resulting from normal pregnancy does not constitute invidious discrimination violative of the Equal Protection Clause. As a result of that decision, District Judge Knapp scheduled argument "as to whether he should, sua sponte, dismiss the complaints" in this case as well as Communications Workers of America v. American Telephone and Telegraph ("Communications Workers") which was also pending before him. (232a)

Formal argument was held before Judge Knapp who stated that he had tentatively and informally concluded that Footnote 20 of Aiello (417 U.S. 496-497, 94 S. Ct. 2492) required dismissal of the complaint in both Communications Workers and here (234a). Judge Knapp expressed difficulty, however, as to what is the best way to handle the lawsuits, noting that there were other claims involved in the plaintiffs' complaint which may not be covered by Aiello and the complaint may be salvageable (234a-235a). He further stated:

> "That being the case, my theory, my present feeling of how this lawsuit should be managed at this particular time would be to dismiss the complaint with leave to re-plead.
>
> Of course, that wouldn't be a final order, as I understand it. Therefore, I would intend to certify pursuant to the appropriate section to the Court of Appeals. My thinking on that is as follows: I either am wrong in my interpretation of Footnote 20 in which event you get a full-fledged lawsuit exactly as you pleaded

> or I am right in my impression of Footnote 20, in which event you may or may not have a mini-lawsuit* . . . (235a)
>
> If I do not dismiss and sustain the complaint, why, then, everybody has to go through the expense of trying the major lawsuit. If I should grant the motion with leave to re-plead and not certify the question, then you have an equally ridiculous result, because in order to get up to the Court of Appeals you have to re-plead, try the mini-lawsuit, then go up to the Court of Appeals and get permission to try the major lawsuit because I was wrong in my interpretation of Footnote 20. Neither of these possible procedures seem to me to make any sense." (235a-236a)

An examination of the transcript of the hearing reveals Judge Knapp'scontinuing inquiry as to whether there were any reasons why his proposed tentative conclusion should not become permanent. Leaving aside the issue of the substantive law, particularly Footnote 20 of Aiello, which was extensively argued, Judge Knapp was primarily concerned with whether the plaintiffs would be injured by not being permitted full and extensive discovery rather than awaiting a decision of this Court to instruct him whether he was correct or not. Throughout the hearing, he requested the plaintiffs to give him reasons why

* The mini-lawsuit contemplated solely plaintiffs' proof that the omission of pregnancy-related disabilities and expenses was merely a pretext for discrimination. (242a)

they lost anything by having the decision of the Court of Appeals rendered before "everybody is put to trying the major lawsuit" (234a; 264a-265a; 268a-271a; 280a-288a).

Judge Knapp notes in his Opinion and Order that: "Counsel for both sets of plaintiffs and for EEOC as amicus curiae . . . finally conceded that months of pre-trial discovery and weeks of trial would produce no new information which would assist the Court of Appeals in determining what affect, if any, Aiello should have on these lawsuits." (302a). Specifically, counsel for plaintiffs herein stated that the plaintiffs would be injured because they would have no method of establishing whether defendants were justified in excluding pregnancy-related disabilities and expenses, a factor which Judge Knapp found to be irrelevant (282a-288a).*

On July 30, 1974, Judge Knapp dismissed plaintiffs' complaint granting leave to plaintiffs to amend their complaint.**

* Ms. Walster stated "I can't think of any other argument except the one that I proposed". (288a)

** Judge Knapp also certified a question to this Court. However, permission to appeal on the question so certified was denied by this Court and the case was remanded to the District Court on October 2, 1974. Communications Workers, 513 F. 2d at 1027, fn. 7.

Plaintiffs refused to so amend and the District Court entered an order of dismissal of the complaint with prejudice on October 10, 1974 (313a-314a).

Appeals from the dismissals of the complaint herein and in Communications Workers were taken to this Court and briefs were filed by all parties. After argument in Communications Workers, this Circuit unanimously reversed Judge Knapp's dismissal of the complaint in that case (513 F. 2d 1024) and shortly thereafter, based on that decision, reversed the dismissal in this case.*

Four of the appellees herein petitioned the Supreme Court for a writ of certiorari. While that petition was pending, the Supreme Court rendered its decision in General Electric Co. v. Gilbert, U.S. , 97 S. Ct. 401 (1976) ("Gilbert"). On January 10, 1977, the Court granted the petition for certiorari sought by the four appellees (U.S. , 97 S.Ct. 724) and remanded this action to this Court for further reconsideration in light of Gilbert.

* No oral argument in this case was heard. An order of reversal was entered and costs were taxed against all of the appellees herein. In the event that this Court should now affirm the dismissal of the complaint, District Council 37 respectfully submits that the costs previously taxed against it be returned and, in addition, that the costs of the instant appeal be taxed against appellants.

OPINION OF THE COURT BELOW

The Court below, in dismissing the complaint herein, correctly read the meaning and purport of Aiello, noting that Footnote 20 "flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)" (295a-296a) and thus the complaint, based as it is solely on that distinction, does not allege a cause of action. The Court stated:

> The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified -- or less justifiable in the employment context than in some other context -- can never be reached. (297a)

The Court held, consistent with Aiello's holding, that "California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender)" (298a) and that "disparity of treatment based on pregnancy does not in and of itself constitute such discrimination." (299a) The Court implicitly recognized that something more than mere non-inclusion of risks had to be alleged and that a complaint based upon the law as declared by

the Aiello District Court was insufficient. Thus, it gave plaintiffs the right to replead (299a-303a), which plaintiffs waived (313a-314a).

SUMMARY OF ARGUMENT

Gilbert, decided by the Supreme Court after the opinion of Judge Knapp, reaffirms the Aiello holding and Judge Knapp's interpretation of it. The plaintiffs' claim solely of non-inclusion of pregnancy-related risks does not sustain a claim of discrimination. Plaintiffs' refusal to amend their complaint to allege that the benefits negotiated on behalf of all female City employees were less than those negotiated for males -- and specifically that the impact of the benefits negotiated and administered by District Council 37 discriminated against females -- conclusively demonstrates that the sole basis of the action herein is to complain about the exclusion of a risk, which Aiello, Gilbert, and the Opinion of the Court below accurately held to be non-actionable under the Fourteenth Amendment and Title VII.

ARGUMENT

PLAINTIFFS' COMPLAINT AGAINST DISTRICT COUNCIL 37 WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION SINCE IT IS BOTTOMED UPON A CLAIM OF NON-INCLUSION OF CERTAIN RISKS RATHER THAN UPON A CLAIM THAT THE RISKS INSURED AGAINST FAVOR MALES OVER FEMALES

Gilbert involved, as here, a claim under Title VII based on the denial of certain claims made by females for disability payments for absence due to pregnancy. The plaintiffs sought damages and an injunction directing General Electric to include pregnancy disabilities within its plan on the same terms and conditions as other non-occupational disabilities.

The Supreme Court, relying upon its prior decision in Aiello, rejected the appellee's claim and repeated (97 S.Ct. at 407):

> "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure." (417 U.S. at 494, 94 S. Ct. at 2491)

The same point was re-emphasized in Aiello, at footnote 20, 417 U.S. at 496-497, 94 S. Ct. at 2492 where the

Court held that the exclusion of pregnancies from disability benefits was a far cry from cases involving discrimination based on gender as such. The exclusion "merely removes one physical condition -- pregnancy -- from the list of compensable disabilities." The Court then noted that:

> "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

The Gilbert Court noted that its holding in Aiello "left no doubt that the exclusion of pregnancy under California's disability benefits plan was not in itself discrimination based on sex". 97 S. Ct at 401.

As a result of Gilbert's reaffirmance in a Title VII case of the principles of Aiello, a Fourteenth Amendment case, it is patently clear that the complaint herein fails to state a cause of action, under either Title VII or the Equal Protections Clause. All that plaintiffs complain of, as against District Council 37, is that plans which it negotiated and administered exclude from coverage related disability benefits and medical expenses for pregnancies and, under an option for major medical coverage, pregnancy benefits. Gilbert reaffirms that the carving

out of certain risks, including one physical condition -- pregnancy -- is not in itself discrimination based on sex. 97 S.Ct. at 407. Further, plaintiffs cannot and do not argue that the distinctions involving pregnancy are mere pretexts, designed to effect an invidious discrimination against the members of one sex or the other, Aiello, 417 U.S. at 496-497, 94 S. Ct. at 2492, because plaintiffs specifically refused to amend their complaint to make that allegation.*

Plaintiffs argue, however, that even though their complaint does not allege either a pretext designed to affect an invidious discrimination and does not allege anything more than a carving out of certain identifiable risks, nonetheless, this does not end the matter. They state that the Supreme Court in Gilbert further considered whether the trial record showed that the challenged plan had any disporportionate effect on women (page 11 of appellants' brief) and assert that this Court must reverse the Court below in order to permit plaintiffs to develop a full record that District Council 37's plan has a grossly disporportionate impact on women.

* When District Judge Knapp dismissed the complaint herein, he specifically gave the opportunity to appellants to amend their complaint in accord with the Supreme Court's Aiello decision. The plaintiffs elected not to replead. (313a).

For example, plaintiffs argue, for the very first time, that they should have an opportunity to discover, among other things, "the average amount of aggregate benefits paid to males and females, the aggregate uncompensated risk experienced by males and females and the cumulative impact of defendants' plans on all other aspects of the employment relationship".* The difficulty with plaintiffs' argument is that what they say they want to prove is nowhere alleged in its complaint. It is the complaint which governs the disposition of this appeal. In defining the scope of the complaint** plaintiffs nowhere point out which of the 81 paragraphs contain the allegations which they now ask this Court for an opportunity to prove. In fact, their complaint was based on neither impact of all covered risks, nor on exclusions of all risks, nor on "all other aspects of the employment relationship." The complaint against District Council 37 is barren of anything more than two limited causes of action based on exclusion of specific risks related to pregnancy. Whereas "other aspects of the employment relationship" may be alleged against other defendants, specifically the de-

* Footnote 9, page 12 of Appellants' brief.

** Appellants' brief, pages 3-5.

nial of leave for pregnancy, District Council 37 is not charged with any such alleged discriminatory act. Such "other aspects", therefore, are entirely inapplicable to District Council 37; and the proof which plaintiffs now seek to elicit, being outside the scope of the complaint, clearly is irrelevant to the defendant herein.*

What plaintiffs further wish to prove also misses the mark, for "the aggregate uncompensated risk experienced by males and females" again concentrates upon exclusions of certain risks, which is precisely what Aiello and Gilbert instruct cannot be discriminatory. The emphasis of both opinions is that

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* The scope of the complaint against District Council 37 is extremely narrow, especially when compared with the complaint in Communications Workers. There the complaint alleged

> that Long Lines "has promulgated and maintained policies, practices, customs and usages which limit the employment opportunities of its female employees because of sex by failing and refusing to provide equal rights, benefits and privileges to females under temporary disability due to pregnancy or childbirth or complications arising therefrom, as are made available to its male employees under temporary disability. [Long Lines'] discriminatory practices and policies involve matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payments under health or disability insurance or sick leave plans. . . . " 513 F. 2d at 1026.

in order to make out a case for discrimination based upon gender, it is necessary to prove that the existing benefits, as awarded, have a discriminatory impact upon one sex or the other. That is not proven by a showing of the value of uncompensated risks.

The only fact which plaintiffs desire to prove, which makes any legal sense, is "the average amount of aggregate benefits paid to males and females" -- a fact which is only now tailored to the recent Gilbert opinion. As noted above, it was not alleged in the complaint; and the prior proceedings demonstrate that this "fact" was never even part of the plaintiffs' theory of this case. Indeed, when Judge Knapp was prodding all counsel to give him a reason why if he dismissed the complaint, plaintiffs would be harmed one iota if the validity of the complaint were presented to this Court without pre-trial discovery, plaintiffs' counsel replied only that defendants should be required to state the reasons why pregnancy-related disabilities were excluded from coverage (289a-294a). Counsel was wholly unconcerned with presenting to this Court the impact of all benefits paid to males and females. That was not part of plaintiffs' case three years ago and should not be permitted to be manufactured as a part of plaintiffs' complaint now. Fortunato v. Ford Motor Company, 464 F. 2d 962, 967 (2nd Cir. 1972), cert. den. 409 U.S. 1058 (1972);

Terkildsen v. Waters, 481 F. 2d 201 (2nd Cir. 1973).

Contrary to plaintiffs' newly formulated argument, the complaint alleges only a distinction -- pregnancy -- based on an attribute unique to one gender, but not universal to that gender. That, held the Supreme Court in Aiello, 417 U.S. at 496, does not "discriminate against any definable group" since "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."* Nor is it alleged by plaintiffs that the benefits for which coverage is available are worth more to men than to women.** Since the complaint as to District Council 37 focuses solely upon the exclusion of certain pregnancy related expenses and the Supreme Court has instructed that the mere exclusion is not actionable under Title VII and the Equal Protection Clause, that, contrary to plaintiffs' argument, ends the matter on the federal claims asserted. If the federal claims fall, plaintiffs' claims based on pendent jurisdiction similarly should be dismissed. Abrams v. Carrier Corporation, 434 F. 2d 1234 (1970).

* The same is cited with approval in Gilbert, 97 S. Ct. at 409.

** Plaintiffs, in their Reply Brief, dated April 9, 1974, conceded that disparate impact was not "specifically alleged" but argued that it was "reasonably embraced by plaintiffs' allegations under theories of notice pleading." (Page 10, fn. 9) No authority for that principle was cited. District Council 37 respectfully submits that "impact" is not now and never was part of plaintiffs' theory of recovery. The sole question presented by the plaintiffs was that discrimination was present simply because the illnesses and disabilities covered were less than inclusive. Gilbert, 97 S.Ct. at 409; see 233a-289a.

CONCLUSION

THE DECISION AND JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT SHOULD BE IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

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Dated: May 12, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, et al Plaintiffs-Appellants, -against- THE CITY OF NEW YORK, et al Defendants-Appellees. On Remand from the Supreme Court of the United States	)	No. 74-2352 Affidavit of Service

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

I, Harry Minott , being duly sworn, deposes and says: I am not a party to the action and am over 18 years of age. On May 13 , 1977, I served a true copy of Brief of Defendant-Appellee District Council 37 upon the following attorneys at the addresses listed by their names, by mailing two copies of same in sealed envelope, with postage prepaid thereon in an official depository of the United States Postal Service within the State of New York:

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Sworn to before me this
13 day of May, 1977.

Jack A. Messina

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Notary Public State of New York
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Cert. filed in New York County
Commission Expires March 30, 1979